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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1458

DOROTHY COSTEN, WIFE OF
AND WESLEY W. NELSON,
Petitioners,

versus

HIRSCHBACH MOTOR LINE and HARTFORD
ACCIDENT & INDEMNITY COMPANY,
Respondents.

Petition for a Writ of Certiorari
To The Supreme Court of Louisiana

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No.

Dorothy Costen, Wife of and Wesley W. Nelson,
Petitioners,

versus

Hirschbach Motor Line and Hartford Accident
& Indemnity Company,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petitioners, Dorothy Costen, wife of and Wesley W. Nelson, pray that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Louisiana rendered in these proceedings on November 25, 1970, refusing to grant writs of certiorari or review to review the opinion and judgment of the Court of Appeal, Fourth Circuit, State of Louisiana, rendered in these proceedings on July 6, 1970.

OPINIONS BELOW

The judgments of the Twenty-ninth Judicial District Court for the Parish of St. John the Baptist are unreported and appear at Appendix A, *infra*, pp. 18-20.

The opinion of the Court of Appeal, reported as *Nelson v. Hirschbach Motor Line,* 239 So. 2d 438 (La. App. 1970), appears at Appendix B, *infra,* pp. 20-30. Petitioners filed a timely application for rehearing in the Court of Appeal, which application was denied on October 5, 1970. Thereafter, petitioners applied to the Supreme Court of Louisiana for writs of certiorari and review. On November 25, 1970, the Supreme Court of Louisiana refused petitioners' application. The opinion of the Supreme Court of Louisiana is reported at La. , 241 So. 2d 256 (1970), and appears at Appendix C, *infra,* pp. 30-31.

JURISDICTION

The order by the Supreme Court of Louisiana was entered on November 25, 1970. See Appendix C, pp. 29-30, *infra.* On February 22, 1971, Hon. Hugo L. Black granted an extension of time for petitioners to file this application through March 17, 1971. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

The Court of Appeal, Fourth Circuit, State of Louisiana, under the authority of Article VII, §29 of the Louisiana Constitution, (which purports to grant Louisiana appellate courts unlimited discretion to review and reverse factual findings by civil juries) reversed a jury verdict which had been approved by the Trial Judge, and in support of which petitioners had offered substantial evidence, on the ground that the Court of Appeal disagreed with the jury's factual determina-

tions. Instead of remanding the case for a new trial, the Court of Appeal rendered judgment for the defendants *non obstante veredicto*. The questions thereby arising are:

1. Whether Article VII, §29 of the Louisiana Constitution, as applied by the Court of Appeal for the Fourth Circuit, State of Louisiana, violates the Seventh Amendment of the United States Constitution in that petitioners were denied the right of trial by jury.

2. Whether Article VII, §29 of the Louisiana Constitution, as applied by the Court of Appeal, Fourth Circuit, State of Louisiana, violates the Seventh Amendment of the United States Constitution in that the Court of Appeal re-examined the facts tried by the jury in a manner which was not according to the rules of common law, in rendering a judgment *non obstante veredicto* instead of remanding the case for a new trial.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VII:

> "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Constitution of the United States, Amendment XIV:

"... nor shall any state deprive any person of life, liberty, or property without due process of law..."

Louisiana Constitution, Article VII, § 29:

...

"All appeals of which the courts of appeal have appellate jurisdiction as provided in this Section shall be on both the law and the facts, except where the appeal is limited to questions of law only by any other Section of this Constitution."

...

STATEMENT OF THE CASE

The facts relevant to the question presented by this petition are uncontroverted and, therefore, may be introduced to the court in a summary fashion. Petitioners were the parents of Kenneth Nelson, who was killed in an automobile collision with a tractor-trailer unit in Louisiana. After a jury trial, petitioners obtained a jury verdict in their favor for Twenty Thousand Dollars each, and reimbursement of funeral expenses and property damage. The Trial Judge denied respondents' motion to grant a new trial.

The Court of Appeal, Fourth Circuit, State of Louisiana reversed. That court did not find that there was no substantial evidence in support of the jury verdict

and no such contention was made by respondents in any court. Nevertheless, the Court of Appeal stated that the verdict of the jury, as approved by the trial court, was erroneous on factual questions, and, rather than remanding the case for a new trial, substituted its own conclusions for those of the jury and rendered a judgment for defendants *non obstante veredicto*.

The Supreme Court of Louisiana refused to grant writs of certiorari or review, stating that there is no error of law in the judgment "on the facts found by the Court of Appeal."

Petitioners, in their petition for rehearing in the Court of Appeal for the Fourth Circuit, State of Louisiana, contended that the action of that court violated the Seventh and Fourteenth Amendments to the United States Constitution and made the same argument in their application to the Louisiana Supreme Court for writs of certiorari and review. Petitioners' Federal claims were thus made at the earliest opportunity and were renewed at each stage of the proceedings below.

In summary, the Louisiana appellate courts have reversed a jury verdict in favor of petitioners, supported by substantial evidence. The reversal was not as a result of any legal errors by the trial Court, but simply because the Court of Appeal disagreed with the jury's factual determinations. See, Opinion of the Court of Appeal, Appendix B, *infra* and the Opinion of the Louisiana Supreme Court refusing writs "on

the facts found by the Court of Appeals", Appendix C, *infra*.

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with due process principles enunciated in many of this Court's recent decisions.

a. *Jury Trials in Federal Courts.* It has long been recognized, in cases tried in the Federal Courts, that the Seventh Amendment requires that jury verdicts, supported by substantial evidence, be not reversed. Moreover, this Court has held that Federal Court of Appeals cannot, consistently with the Seventh Amendment, enter a judgment *n.o.v.* against the party who won the jury verdict, if the verdict is supported by substantial evidence; but, instead, it must order a new trial. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1912). Any other rule would render Seventh Amendment protections illusory. Accordingly, there seems little question but that had this case been tried in the Federal system, a Court of Appeals would have been prevented by the Seventh Amendment from disturbing the judgment of the jury which condemned the wrongdoer and its insurer to pay damages for the death of petitioners' son. At most, a new trial could have been ordered.

b. *Decisions Restricting Seventh Amendment Protection to Federal Courts.* There is a line of decisions by this Court, beginning before the enactment of the Fourteenth Amendment, to the effect that the Seventh

Amendment does not apply to the states. We will attempt to demonstrate that each of the reasons advanced in support of this line of decisions has been rejected in the Court's later decisions on closely related questions. Since the reasons for these decisions are no longer supportable, the decisions themselves should be reversed, unless there is some new reason, not previously announced, for depriving state plaintiffs of civil jury trials.

The difficulty apparently began in *Barron v. Baltimore,* 7 Peters 243 (1833), in which the Court (Marshall, C.J.) held that the Fifth Amendment declaration that private property shall not be taken for public use without full compensation is not applicable to the states. In *dicta,* the Court stated, without qualification, that the Bill of Rights does not apply to state governments. In the same year, in *Lessee of Livingston v. Moore,* 7 Peters 469 (1833), the Court said that it is "now settled" that the Bill of Rights does not apply to the states.

Then, in *Fox v. Ohio,* 5 Howard 410 (1847) the Court held, citing only *Barron v. Baltimore, supra,* that the Sixth Amendment guarantee of a jury trial in criminal cases does not apply to the states. An identical holding was made in *Twitchell v. Commonwealth,* 7 Wallace 321 (1868), which cited only *Barron v. Baltimore, supra,* and *Fox v. Ohio, supra.*

In the light of these cases, the direction in which the Court would go on the applicability of the Seventh Amendment to the states could have been predicted.

The first case to mention the issue was *Edwards v. Elliott*, 22 Wallace 532 (1874), in which the Court said, in *dicta*, that the Seventh Amendment does not apply to trials in state courts, citing each of the cases discussed above, and *Smith v. Maryland*, 18 Howard 76 (1855), which held that the constitutional provisions forbidding the issuance of a warrant except on probable cause under oath does not apply to the states.

The first holding that the Seventh Amendment does not apply to the states was *Walker v. Sauvinet*, 92 U.S. 90 (1876), but it did so on the sole authority of *Edwards v. Elliott*, supra. The same is true of the next case, *Pearson v. Yewdall*, 95 U.S. 294 (1877).

Even after the enactment of the Fourteenth Amendment, the Court reaffirmed its belief that the Bill of Rights, including the Sixth Amendment, does not apply to the states, in *Spies v. Illinois*, 123 U.S. 131 (1887); and the doctrine was applied to contempt proceedings in *Eilenbecker v. District Court*, 134 U.S. 31 (1890). The later cases developed consistently from these beginnings. The Court would use the Sixth Amendment decisions as authority for Seventh Amendment cases, and vice versa. *Brown v. Walker*, 161 U.S. 591 (1896); *Brown v. New Jersey*, 175 U.S. 172 (1899); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226 (1923). Since *Barron v. Baltimore* taught that none of the Bill of Rights applies to the States, it mattered little which provision was questioned. The universal governed the particular.

c. *Later Developments.* The near perfect syllogism represented by the above cases, has been destroyed by recent decisions in every particular. *Barron v. Baltimore, supra,* was, of course, the major premise. It was destroyed in *Gitlow v. New York,* 268 U.S. 652 (1925), which held that First Amendment rights are so fundamental that they cannot be impaired by the states.

Since 1925, practically every provision of the Bill of Rights has been held applicable to the States.[1] Included have been freedom of religion,[2] assembly and petition,[3] the right to counsel first in capital cases,[4] and then in all criminal cases.[5] The list is growing each term of Court.

If the major premise of the syllogism was *Barron v. Baltimore,* and it has been completely discarded, what of the minor premise? As shown above, the cases which held that the Seventh Amendment was not applicable to the states relied heavily on the Sixth Amendment cases in which the Court had decided that the guarantee of a jury trial in criminal cases does not apply to the states.

Fortunately, the old Sixth Amendment cases have also recently been overturned. In *Duncan v. Louisiana,*

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[1]Bartholomew, *The Gitlow Doctrine Down to Date,* 50 Am. Bar. Assn. J. 139 (1964); Bartholomew, *The Gitlow Doctrine Down to Date, II,* 54 Am. Bar. Assn. J. 785 (1968).

[2]*Hamilton v. Regents of the University of California,* 293 U.S. 245 (1934).

[3]*DeJonge v. Oregon,* 299 U.S. 353 (1937).

[4]*Powell v. Alabama,* 287 U.S. 45 (1932).

[5]*Gideon v. Wainwright,* 372 U.S. 335 (1963)

391 U.S. 145 (1968), it was pointed out that a criminal defendant's right to a jury trial is among those fundamental principles basic to our civil and political institutions and is essential to a fair trial. Therefore, in serious cases, the right to a jury trial cannot be denied by the states. And in *Bloom v. Illinois,* 391 U. S. 194 (1968), it was recognized that the right to a jury trial extends to serious criminal contempt charges, which right also cannot be denied by the states.

Accordingly, all of the reasons which were advanced (in *Edwards v. Elliott, supra,* for example) for allowing the states to deny their citizens the right to a jury trial in criminal cases have now been proven insubstantial. *Barron v. Baltimore's* doctrine that no part of the Bill of Rights applied to the states, has now been so frequently rejected by the Court as to indicate that the truth is probably exactly the opposite. The Sixth Amendment decisions, relied on as argument for denying juries in civil cases, have now come to be strong support for the opposite result.

We submit, therefore, that since there is no logical basis for those decisions, under which citizens of the United States are denied the right to a jury trial in civil cases, they should be overruled.

d. *The Fundamental Nature of the Seventh Amendment.* If recent decisions have completely sapped the strength of the precedents usually cited to allow a state to deny Seventh Amendment rights, the decision below should be reversed unless there is

some new reason, not stated in the earlier cases, which would compel the same result.

The proper constitutional method in Fourteenth Amendment cases was suggested in *Gitlow v. New York*, 268 U.S. 652 (1925), in which the means of determining whether a particular provision of the Bill of Rights should be applied to the states by reason of the Fourteenth Amendment was considered. The Court said that the Fourteenth Amendment protects those specific guarantees of the Bill of Rights which are regarded as fundamental. Since *Gitlow*, a question which must be decided in Fourteenth Amendment cases, is whether the right sought to be applied is fundamental.[6]

Considered in this light, the question may be raised as to whether the Seventh Amendment's guarantee of a civil jury trial is sufficiently fundamental to be applied to the States. To answer it is necessary to briefly review the historical background of the Seventh Amendment.

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[6]It is interesting to note that practically every section of the Bill of Rights which has been considered by the Court has been deemed sufficiently fundamental to be applied to the states by the Fourteenth Amendment. See, *Bartholomew, the Gitlow Doctrine Down to Date*, 50 Am. Bar. Assn. J. 139 (1964) and *Bartholomew, The Gitlow Doctrine Down to Date, II*, 54 Am. Bar. Assn. J. 785 (1968). *Barron v. Baltimore* has been almost completely turned around.

Some of the Justices have felt that each provision of the Bill of Rights, without exception, should be applied to the States through the Fourteenth Amendment. See, e.g. *Adamson v. California*, 332 U.S. 46 (1947). Although the majority of the Court has never specifically adopted this viewpoint, it appears that by applying each provision of the Bill of Rights in a case by case fashion, the same result is being reached.

The draft of the United States Constitution,[7] as submitted to the various State Legislatures for approval, contained but one Section (Art. III, Sec. 2, Clause 3) relating to juries. That Section provided: "The trial of all crimes, except in cases of impeachment, shall be by jury;. . ." There was no provision in the draft for jury trials in civil cases.

These omissions ignited one of the bitterest attacks that was made upon the draft. Thomas Jefferson was prominent in the opposition; he repeatedly stressed the inadequacy of the draft concerning trial by jury. In a letter to Madison, he proposed an amendment providing for "trial by juries in all matters of fact triable by the law of the land." Jefferson continued his opposition to the Constitution until it was adopted by Massachusetts, with definite instructions to her delegates in Congress to insist upon the Bill of Rights which had then been drafted.[8]

Those opposed to the draft of the Constitution without a Bill of Rights apparently believed that the Constitution, as drafted, would abolish trial by jury in civil cases. For example, this belief was articulated by "A Democratic Federalist" writing in the *Pennsylvania*

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[7]That trial by jury was considered an integral part of the colonists' heritage as free men, even before the Constitution, can be seen from the fact that they listed, in the Declaration of Independence, among other usurpations of the King of England, his depriving the colonists "in many cases, of the benefits of Trial by Jury . . ."

[8]Claude G. Bowers, "The Young Jefferson," Boston, Mass: Houghton Mifflin Co., (1945) pp. 504-505.

Packet for October 23, 1787. Answering a speech by James Wilson, the Federalist wrote as follows:

> "The second and most important objection to the federal plan, which Mr. Wilson pretends to be made in a disingenuous form, is the entire abolition of the trial by jury in civil cases.
> . . .
>
> "But, setting aside the equivocal answers of Mr. Wilson, I have it in my power to prove that under the proposed Federal Constitution, *the trial of facts in civil cases by a jury of the vicinage* is entirely and effectually abolished, and will be absolutely impracticable [under the appellate jurisdiction as to law and fact which is vested in the United States Supreme Court] . . . The word *appeal,* if I understand it right, in its proper legal significance included the fact as well as the law, and precludes every idea of a trial by jury. . ."[9]

Justice Story, writing at a later period, expressed the universal sentiment of the colonists:

> "It [the Seventh Amendment] is a most important and valuable amendment and places upon the high ground of constitutional right the inestimable privilege of trial by jury in civil cases — a privilege scarcely inferior to that in

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[9]Reprinted in *Pennsylvania and The Federal Constitution,* 152-53 (J. McMaster & F. Stone eds. 1888).

> criminal cases, which is conceded by all to be essential to political and civil liberty."[10]

And speaking for the Court in *Parsons v. Bedford,* 3 U.S. (Peters) 433, 445 (1830), Justice Story said that the absence of a right of trial by jury in civil cases was "one of the strongest objections originally taken against the Constitution of the United States." Further, the Seventh Amendment "received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people." In the same decision, Justice Story characterized the "other clause" of the Seventh Amendment, guaranteeing that no fact tried by a jury shall be re-examined other than according to common law, as "still more important." and in *Jacob v. New York City,* 315 U.S. 752 (1942) the Court stated:

> "The right of jury trial for civil cases at common law is a basic and fundamental feature of our system of Federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizens, whether guaranteed by the Constitution or provided by Statute, should be jealously guarded by the courts."

We submit, therefore, that the Louisiana Appellate system which effectively emasculates the civil jury system by allowing appellate courts unlimited discre-

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[10] *Joseph Story, Commentaries on the Constitution,* (Cambridge, Mass.: Brown, Shattuck & Co., 1833) Vol. III, p. 633.

tion[11] to substitute their own judgment for that of the jury, and to grant judgments *non obstante veredicto,* is contrary to the fundamental policies of the Seventh Amendment to the United States Constitution. We further submit that these policies are so basic and fundamental as to clearly indicate that they should be applied to the states.[12]

2. The Issues Presented Have Great Public Importance

Although it may be argued that in criminal trials the jury determines the personal liberty of the accused, whereas civil trials "only" affect the property rights of the litigants involved, such an argument is unsatisfactory. A person unjustly dispossessed of his property is as assuredly deprived of his liberty as the unjustly convicted person. Rights of property have, since the inception of civil societies, remained bound to liberty. In its broadest sense, property is the medium which affords the individuals that independence required to demand and contend for liberty.

The enactors of the Bill of Rights placed the Seventh Amendment just after the Sixth Amendment; we believe that this was an appropriate juxtaposition — perhaps not entirely fortuitous. Although the Sixth Amendment's guarantee of a jury trial in criminal cases is

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[11]The Supreme Court of Louisiana is given the same power, in civil cases, to review both the law and the facts. Louisiana Constitution, Article VII, §9.

[12]See, Justice Frank W. Summers, *Some Merits of Civil Jury Trials,* 39 Tul. L. Rev. 3 (1964).

admittedly of first importance, the Seventh Amendment ranks not far behind. And it was so recognized in the Bill of Rights.

The practical result of Louisiana's unique system of appellate review has been to reduce jury trials in Louisiana state courts almost to the point of extinction. As Professor David W. Robertson recently pointed out:[13]

> "In Louisiana . . . the civil jury trial is a relatively rare phenomenon . . . and it is seldom exercised. The reasons are not far to seek. The Louisiana Constitution provides that appeals in civil cases shall lie as to both law and fact."

A New Orleans attorney, who customarily represents insurance companies, enthusiastically reported in 1963 that: "The fact is that only 300 jury trials, both civil and criminal, plagued Louisiana's district courts dockets for all sixty-four parishes in 1962."[14]

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[13]Robertson, *Conclusions of Fact in Civil Cases*, 29 La. Rev. 78, 83 (1968). To the same effect, see Hubert, *Trial by Jury Under the New Code of Civil Procedure*, 35 Tul. L. Rev. 520 (1961): "Plenary review of the facts at the appellate level led to a steady diminution in the number of trials by jury, so that today a jury trial is the exception rather than the rule."; and Deutsch, *Jury Trials Under Federal Rules*, 3 La. L. Rev. 422, 426 (1941).

[14]Sarpy, *Civil Juries, Their Decline and Eventual Fall*, 11 Loyola L. Rev. 243, 255 (1963). He described the situation in Louisiana as "utopian," and called for the "complete elimination of civil jury trials by abolishing the Seventh Amendment." Id. at p. 269.

That an effective civil jury system has been denied the people of an entire state is of great moment. It fully justifies the granting of certiorari and the reversal of the decision below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Louisiana Supreme Court.

Respectfully submitted,

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APPENDIX A

29TH JUDICIAL DISTRICT COURT
PARISH OF ST. JOHN THE BAPTIST
STATE OF LOUISIANA

DOROTHY COSTEN NELSON, ET AL

versus

HIRSCHBACH MOTOR LINE, ET AL

NO. 3006

JUDGMENT

Pursuant to the verdict of the Jury herein, and considering the same to be supported by the law and the evidence:

IT IS ORDERED, ADJUDGED AND DECREED THAT:

There be judgment herein in favor of Dorothy Costen Nelson in the amount of $20000.00, and, in favor of Wesley W. Nelson in the amount of $20000.00 together with $2000.00 as funeral expense, all against Hirschbach Motor line and Hartford Accident & Indemnity Company, to the extent of its policy, together with legal interest thereon from date of judicial demand until paid and all costs.

READ, RENDERED AND SIGNED IN OPEN COURT AT EDGARD, LA., THIS 20th. DAY OF SEPTEMBER, 1968.

(Signed) C. WILLIAM BRADLEY
JUDGE

29TH. JUDICIAL DISTRICT COURT
PARISH OF ST. JOHN THE BAPTIST
STATE OF LOUISIANA

DOROTHY COSTEN NELSON, ET AL.

versus

HIRSCHBACH MOTOR LINE, ET AL.

No. 3006

FILED: SEP. 26, 1968 by CLERK: Audrey Holmes

JUDGMENT

Motion for a new trial or, alternatively, a remittitur was argued.

This Court is of the opinion that the verdict of the Jury is not manifestly erroneous, nor is the award of the Jury manifestly excessive.

Accordingly, the rules are dismissed at mover's cost. Judgment Read, Rendered and Signed in Open Court at Edgard, Louisiana, on this 26th day of September, 1968.

(Signed) C. WILLIAM BRADLEY
C. WILLIAM BRADLEY
JUDGE

APPENDIX B

Dorothy COSTEN, Wife of/and Wesley W. NELSON
versus

HIRSCHBACH MOTOR LINE and Hartford Accident and Indemnity Company.

No. 4012.

Court of Appeals of Louisiana,
Fourth Circuit.

July 6, 1970.

Rehearing Denied Oct. 5, 1970.

Before REGAN, BARNETTE and SWIFT, JJ.

SWIFT, Judge.

This action arose from a car-truck collision which

occurred at about 2:55 A.M. on April 14, 1966, on U. S. Highway 51 approximately two miles south of the Pass Manchac Bridge. At this point the highway runs generally north and south. Involved in the accident were a 1965 Volkswagen which was driven in a northerly direction by the plaintiffs' son, Kenneth W. Nelson, and a 1965 White Freighter tractor-trailer unit that was driven towards the south by Charles J. Rowland in the course of his employment with defendant, Hirschbach Motor Line.

The truck was owned by Hirschbach and insured by Hartford Accident and Indemnity Company, the other defendant. When empty it weighed some 28,000 pounds, and at the time of the collision it was carrying approximately 35,000 pounds of meat. The width of the unit at its widest point was about eight feet. It was equipped with air brakes.

According to the log of the truck's itinerary, Donald M. Thomason, co-driver with Rowland, drove the truck from Jackson, Mississippi to Hammond, Louisiana, during the hours from 11:00 P.M. to 2:00 A.M. preceding the accident. Rowland slept in the compartment provided for that purpose, while Thomason handled the driving duties. Following a brief fifteen minute stop at Hammond, Rowland took his turn of duty at the wheel and headed for New Orleans. From this point on Thomason was in the process of going to sleep in the sleeping compartment.

Kenneth Nelson, a 20 year old student at Southeastern Louisiana College in Hammond, died in the col-

lision. Therefore, the only surviving eye witness was the truck driver, Charles Rowland.

The action was tried and submitted to a jury for a special verdict. The jury found both Rowland and Nelson guilty of negligence, but that only Rowland's negligence was a proximate cause of the accident. It also concluded that Rowland had the last clear chance to avoid the accident. Damages were assessed to $20,000.00 for each parent, with an additional $2,000.00 for Mr. Nelson for funeral expenses. Upon the signing of a judgment in accordance with the verdict, defendants filed motions for a new trial and a remittitur. Both motions were denied and defendants have taken this appeal.

Charles Rowland testified he had operated large trucks for about thirteen years before this accident. Just before the collision he was travelling about 50 miles per hour and first noticed the headlights of the Volkswagen when the vehicles were about 500 or 600 feet apart. At this time the Volkswagen was partially in the south bound lane in which his truck was travelling. He estimated the speed of the approaching vehicle at about 30 or 35, or possibly 50 miles per hour, but added that he really did not know how fast it was going.

In order to alert the driver of the automobile to his improper position, Rowland raised and lowered the truck's headlights and removed his foot from the accelerator to reduce its speed. Apparently responding to the warning signal, the other driver returned his

vehicle to its proper lane of travel. Rowland said he then resumed his former speed.

When the vehicles were about 300 feet apart the Volkswagen again entered the south bound lane. Rowland reacted by taking his foot off the accelerator and moving the truck slightly to the right in the south bound lane. He did not remember whether he applied the brakes at this moment. The Volkswagen continued across the highway and on the shoulder of the south bound lane. Rowland guessed the vehicles were about 100 feet apart at the time.

The truck driver was unable to state with exactness just what occurred from this point on, but thought probably he had applied the brakes and pulled to his left in an effort to avoid the approaching vehicle. He did recall, however, that the automobile veered from the west shoulder of the highway into the path of the truck, striking the latter's right front corner with its left front. The force of the impact tilted the tractor-trailer unit, causing it to fall on the left or driver's side and slide, along with the entrapped automobile, for approximately 180 feet.

The testimony of Troopers Aubert and Lemay, the investigating officers, and the photographs taken of the scene and vehicles confirm Mr. Rowland's account of the accident in most respects.

Trooper Allen J. Aubert expressed the opinion, on the basis of the truck's tire prints and the fallen debris, that at the moment of impact, which he located about

in the middle of the highway, the truck was travelling in a southeasterly direction. He further testified that the above mentioned physical evidence, the damages to the respective vehicles and the final resting place of the automobile on the west shoulder of the road indicated the automobile was travelling in the wrong lane and the truck was trying to avoid it at the moment of the collision. The trooper acknowledged, however, that he had also taken into account what the truck driver told him in reaching this conclusion.

The testimony of the other investigating officer, William Lemay, was somewhat inconclusive as to the location of the point of impact. On direct examination he placed this in the middle of the north bound lane, but on cross examination he located the point of impact closer to the center than to the east shoulder of the highway. Nevertheless, Trooper Lemay, like Trooper Aubert, concluded after investigation that the accident had occurred as related by the driver of the truck.

The photographs of the highway and tire marks thereon show clearly that the truck was in its proper lane when the brakes were applied, and that it then veered to its left, just before the impact. The photographs of the tractor-trailer leave no doubt that the initial impact was to its right front corner.

The jury undoubtedly accepted Mr. Rowland's testimony that the driver of the Volkswagen was on the wrong side of the highway immediately before the accident. Otherwise, there would be no basis for its finding that Kenneth Nelson was negligent. We concur with

the special verdict in this respect. However, we are convinced the findings that Nelson's negligence was not a proximate cause of the accident, that Charles Rowland was guilty of negligence which proximately caused same and that Rowland had the last clear chance to avoid the collision are manifestly in error.

Although subject to many and varied definitions, proximate cause has been defined briefly by our Supreme Court in Dixie Drive It Yourself System New Orleans Co. v. American Beverage Co., 242 La. 471, 137 So.2d 298 (1962), as follows:

> "Negligent conduct is a cause-in-fact of harm to another if it was a substantial factor in bringing about that harm. Under the circumstances of this case, the negligent conduct is undoubtedly a substantial factor in bringing about the collision if the collision would not have occurred without it. A cause-in-fact is a necessary antecedent. If the collision would have occurred irrespective of the negligence of the driver of the R C Cola truck, then his negligence was not a substantial factor or cause-in-fact. * * *". (137 So.2d 302).

Undoubtedly, the operation of the Volkswagen on the wrong side of the highway was a substantial factor in bringing about this accident, and it would not have occurred had the automobile remained in its proper lane. It is therefore clear that such negligence on the part of its driver was a proximate cause of the accident.

The doctrine of last clear chance, generally stated, allows recovery for injuries sustained, notwithstanding plaintiff's negligence in exposing himself to the danger from which the injury arose, if the defendant, after becoming aware of the peril in time to avoid the injury, failed to exercise ordinary care to do so. 65A. C.J.S. Negligence § 136(1). For the doctrine to be applicable, these three essential elements must be established: (1) the person relying thereon was in a position of danger of which he was unaware or from which he was unable to extricate himself; (2) the person against whom the doctrine is invoked actually discovered or should have discovered the other person's peril; and (3) at such time the person against whom the doctrine is invoked could have avoided the accident with the exercise of reasonable care. Meynier & Dillman Hardware Co. v. Aronson, 229 So.2d 365 (La.App. 4 Cir. 1970). Of course, there can be no recovery under this doctrine from a defendant who exercised due care in discovering the plaintiff's peril, and after discovering it could not have avoided the accident. Litton v. Samuel, 98 So.2d 534 (La.App. 2 Cir. 1957). Also, a defendant who discovers the plight of another is exonerated from liability even though the actions taken to prevent the accident fail if his actions are those of a normally prudent and reasonable person. The defendant in such situation is not held to a standard of unerring judgment when confronted with an emergency created through negligence of another. Jones v. Continental Casualty Company of Chicago, Illinois, 246 La. 921, 169 So.2d 50 (1964); Gage v. Nesser, 119 So.2d 98 (La. App. 1 Cir. 1960); Guidry v. United States Casualty Co., 134 So.2d 319 (La. App. 3 Cir. 1961).

The preponderance of evidence in the record establishes that Charles Rowland acted with reasonable care and made every effort to avoid the collision. Therefore, the doctrine of last clear chance has no application in this instance.

When Rowland first saw the Nelson vehicle in the improper south bound lane, Nelson responded to the warning signal by returning his vehicle to the north bound lane. Certainly, at this point Rowland had no reason to be aware of any incapacity on the part of the other driver or that he was, or soon would be, in a perilous position. In light of the prior conduct of the decedent Rowland may have been entitled to believe the automobile would be returned to its proper lane at the moment it entered the south bound lane for the second time. But if not, we are firmly convinced it was then too late for him to have avoided the accident through the exercise of any reasonable means and that his actions in face of the sudden emergency created by the automobile driver were prudent.

The rapidity with which these events occurred is illustrated by the following testimony of co-driver Thomason:

"Q. What is the first thing you knew of any kind in the world something extra ordinary or out of the ordinary was about to happen?

A. Well, I was about half asleep, I imagine caught about half way, I heard Mr. Rowland exclaim 'My God, that man's asleep!'

> And the next thing I knew we was on the side."

Counsel for plaintiffs contend that Rowland's own testimony reveals he had sufficient time to avoid the accident after discovering young Nelson's predicament. He points to the truck driver's estimate of "about one minute" between the time he first noticed the car on his side of the road and the impact. As we have already pointed out, there was no reason for Mr. Rowland to be aware of the decedent's being in a perilous situation when he crossed the center line the first time. However, we note that when asked by counsel for an estimate of such time period he first said, "Not very long — minutes, seconds, half a minute." And as to the elapsed time between the second crossing of the center line and the impact his answer was, "Ten seconds maybe, I don't know." Aside from the fact that estimates of time, speed and distance are at best mere educated guesses and often are unreliable no matter how honestly made, it must be remembered that these time estimates were reached on the witness stand in the courtroom, and concern events and periods which took place more than two years before. It is obvious from these and his other answers that Rowland was doing his best to give rough estimates in order to answer counsel's questions.

Mr. Rowland also estimated that the car was about 300 feet from him when it entered his lane for the second time and that it was travelling from 30 to 50 miles per hour. His testimony that the truck was going about 50 miles per hour at this time was not merely an esti-

mate as its speedometer was before him. The rate of closure between the two vehicles under such circumstances would not be less than 117 feet per second, thus affording the truck driver less than three seconds to avoid the accident after the car crossed the road the second time.

We are convinced from the record as a whole that it was only a matter of seconds between the time Mr. Rowland was, or should have been, aware of the decedent's peril and the impact. That he could have stopped or maneuvered this 30 ton vehicle, which was proceeding lawfully on the highway at 50 miles per hour, in such time and have avoided the accident is beyond comprehension. On the contrary, the actions taken by the driver were most reasonable and prudent.

Plaintiffs' contention that we should reject Charles Rowland's testimony in toto under the doctrine of "falsus in uno, falsus in omnibus", because of the inconsistency between his estimates of time intervals and distances involved, is without merit. His estimate of "about one minute" elapsing between the Volkswagen's first being in the wrong lane and the impact was in error. However, it is clear from the record that the witness did not intentionally testify falsely in this respect. As heretofore pointed out, this was a rough guess made by Mr. Rowland when it is apparent that he was trying his best to answer a difficult question asked by counsel. It is apparent from the record that he was a forthright and credible witness, and there is no indication the jury considered him otherwise.

For the foregoing reasons, the judgment of the district court is reversed and set aside and judgment is hereby rendered in favor of defendants, Hirschbach Motor Line and Hartford Accident and Indemnity Company, and against plaintiffs, Dorothy Costen Nelson and Wesley W. Nelson, rejecting their demands and dismissing this suit at their costs. Plaintiffs are also assessed with the costs of this appeal.

Reversed and rendered.

APPENDIX C

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

DOROTHY COSTEN wife of/and
WESLEY W. NELSON

versus

HIRSCHBACH MOTOR LINE and HARTFORD
ACCIDENT AND INDEMNITY COMPANY

November 25, 1970

No. 50,963

In re:
Dorothy Costen, wife of/and Wesley W. Nel-

son applying for certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, Parish of St. John the Baptist.

Writ refused. On the facts found by the Court of Appeal, there is no error of law in its judgment.

/s/ JWS
/s/ JBH
/s/ EHMcC
/s/ WBH
/s/ FWS
/s/ MEB
/s/ AT JR.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
November 25, 1970

/s/ S. Wallace Miller
Deputy Clerk

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1458

DOROTHY COSTEN, WIFE OF AND
WESLEY W. NELSON,

Petitioners,

versus

HIRSCHBACH MOTOR LINE AND HARTFORD
ACCIDENT AND INDEMNITY COMPANY,

Respondents.

OPPOSITION OF HIRSCHBACH MOTOR LINE and HARTFORD ACCIDENT AND INDEMNITY COMPANY, RESPONDENTS-OPPONENTS TO THE APPLICATION FOR WRITS OF CERTIORARI ARD REVIEW.

MAY IT PLEASE THE COURT:

Counsel for opponents to the application for Writs of Certiorari and Review in this Court, would not ordinarily file an opposition to the application for review as we feel the case as presented to this Honorable Court is sufficient unto itself to refute applicants' position.

However, as applicants herein sought for the first time to introduce into this proceeding in their petition for a rehearing in the Fourth Circuit, Court of Appeal for the State of Louisiana, questions as to the consti-

tutionality of the actions of said Court of Appeal in rendering its judgment reversing the verdict and judgment below, and of the constitutional and statutory provisions of the State of Louisiana upon which this appellate decision was rendered as being in conflict with the 7th Amendment to the Constitution of the United States as amended by the 14th Amendment thereof, and has again raised these questions of those constitutional violations in this Court, we feel that this appearance in opposition thereto is proper.

For the convenience of this Court, we quote from Article 7 (Section 29) of the Constitution of Louisiana for the year 1921, as it has been amended (Act 561 of 1958):

"Sec. 29. Appellate and supervisory jurisdiction.

Section 29. Any provision of this Constitution or law to the contrary notwithstanding, the courts of appeal have appellate jurisdiction of the following cases of which the Supreme Court is not given appellate jurisdiction under Article VII, Section 10 of this Constitution; all matters appealed from the family and juvenile courts, except criminal prosecutions against persons other than juveniles; all civil and probate matters of which the district courts throughout the state have exclusive original jurisdiction; and all civil matters involving more than one hundred dollars, exclusive of interest, of which the district courts throughout the state have concurrent jurisdiction.

> *All appeals of which the courts of appeal have appellate jurisdiction as provided in this Section shall be on both the law and the facts, except where the appeal is limited to questions of law only by any other Section of this Constitution.* (Emphasis ours)
>
> Each court of appeal has supervisory jurisdiction, subject to the general supervisory jurisdiction of the Supreme Court, over all inferior courts in all cases in which an appeal would lie to the court of appeal."

We also quote from Article 2164 of the Code of Civil Procedure of the State of Louisiana:

> "Art. 2164. Scope of appeal and action to be taken; costs
>
> The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable."

both of which quotations are self-explanatory and provide for the rights of Appellate Courts of the State of Louisiana to decide an appeal on both questions of law and of fact.

Our appeal as was set forth in our original brief filed in the Court of Appeal for the Fourth Circuit of Louisiana was based on both law and fact.

The 7th Amendment to the United States Constitution reads as follows:

"AMENDMENT VII-CIVIL TRIALS

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

and the pertinent section of Amendment No. 14 to the Federal Constitution reads as follows:

"AMENDMENT XIV. - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws. * * * "

Applicants now contend and have so contended since their petition for rehearing in the Court of Appeal, that this appeal from a District Court of the State of Louisiana to the proper Appellate Court of said State, is violative of the 7th Amendment to the United States Constitution as is amended by the 14th Amendment thereto.

In our opposition brief to the petition for rehearing in the Court of Appeal and in our opposition to the Application for Writs in the Supreme Court of Louisiana, we have pointed out and cited authorities for the fact that this Court has held on a number of occasions and quite recently held that these limitations imposed by the 7th and 14th Amendments apply to proceedings from Federal Courts only and not to proceedings in State Courts, such as is involved herein.

In this connection we cite a number of cases from this Court on this subject and feel as a result thereof that the decisions of the Court of Appeal and of the Supreme Court of Louisiana are eminently correct.

Tannehill v Roberts, 216 So.(2d) 656 - Writs refused in the Supreme Court of Louisiana, 219 So.(2) 176 and Writs refused in the Supreme Court of the United States, (October 13, 1969) 24 L.Ed. (2) 73, 396 U.S. 822.

Lumberman's Mutual Casualty Company v Elbert, 99 L.Ed. 59 (see p. 64), 348 U.S. 48

Fay v New York, 91 L.Ed. 2043 (see pp. 2060-61) 332 U.S. 261

Walker v Sauvinet, 92 U.S. 90, Book 23 P. 678

Maxwell v Dow, 176 U.S. 581, 44 L.Ed. 597 (see pp. 603-4)

New York Central Railroad Company v White, 243 U.S. 187, 61 L.Ed. 667

Wagner Electric Manufacturing Company v Lyndon, 262 U.S. 226, 67 L.Ed. 961 (see p. 964)

Minneapolis & St.L.R.Co. v Bombolis, 241 U.S. 210, 60 L.Ed. 961, 963-965

Mountain Timber Company v Washington, 61 L.Ed. 685 (p. 695), 243 U.S. 219

Palko v Connecticut, 302 U.S. 319, 82 L.Ed. 288

For an extremely full, precise and comprehensive statement of the law as is thus recognized, we quote from *Olsen v Trust Company of Chicago*, 245 Fed.(2) 522 (see page 524) in which case writs were refused by this Court, 355 U.S. 896, 2 L.Ed. (2) 193:

> "1) It is clear there is no federal question involved in the case at bar. The Seventh Amendment of the United States Constitution applies to trials in the United States Courts. Bute v People of State of Illinois, 333 U.S. 640, 657 (footnote), 68 S.Ct. 763, 92 L.Ed. 986. *Trial by jury in civil actions in state courts may be modified by a state or abolished altogether.* Walker v Sauvinet, 92 U.S. 494, 44 L.Ed. 597; New York Central Railroad Company v White, 243 U.S. 187, 208, 37 S.Ct. 247, 61 L.Ed. 667; Wag-

ner Electric Manufacturing Company v Lyndon, 262 U.S. 226, 232, 67 L.Ed. 961.

"2) A denial of trial by jury in a state court is not a denial of due process of law under the Fourteenth Amendment. The Fourteenth Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. Hardware Dealers' Mutual Fire Insurance Company of Wisconsin v Glidden Co., 284 U.S. 151, 158, 52 S.Ct. 69, 71, 76 L.Ed. 214." (Emphasis added)

Since the case of *Tannehill v Roberts,* cited by us supra (p. 5 hereof) is so similar to the issues of this case and since it even stems from the same Court of Appeal and as it involves practically all issues involved herein, including the possible violation of the Louisiana constitutional provisions (supra) and the provision of the pertinent articles of the Louisiana Code of Civil Procedure with Amendments No. 7 and No. 14 of the United States Constitution and since this Honorable Court refused to review these questions by its refusal of writs therein, we feel that this is probably the leading case on the subject.

In passing and even though we feel the constitutional questions raised in this proceeding have been disposed of above, we feel that we cannot but point out that even if we were incorrect in these thoughts, which we most emphatically feel to be correct, that then and even then, Learned Counsel for Applicants has attempted to interpose these questions too late into this pro-

ceeding, having only raised them for the first time on rehearing in the Court of Appeal for the Fourth Circuit of Louisiana.

To this effect we cite to the Court its decisions in the following cases:

Forbes v State Council of Virginia, 54 L.Ed. 534 (see pp 535-536), 216 U.S. 396
Loeber v Schroeder, 149 U.S. 580, 37 L.Ed. 856
Pim v St. Louis, 41 L.Ed. 714, 165 U.S. 273
Bilby v Stewart, 62 L.Ed. 701, 246 U.S. 255
Herndon v Georgia, 79 L.Ed. 1530 (see pp 1532-34) 295 U.S. 440

Since writing the above we have now received copies of applicants' petition for writs in this Court and while we feel that this opposition as above set forth is sufficient for our purposes, we would like to add the following:

DISCUSSION OF APPLICANTS' MORE RECENT AUTHORITIES

If we are correct in interpreting the Court's rules where there is some area of disagreement as to facts, would the Court and Learned Counsel not deem us presumptuous, if, in lieu of restating the introductory paragraph of Petitioners' "Questions Presented" as appears on pages 2 and 3 of their petition, and in lieu of restating the 1st, 2nd and 5th paragraphs of their "Statement of the Case" as appears from page 4-5 of their petition we would refer the Court to the opinion

of the Court of Appeal as appears on page 20 et seq. of said petition to better state our position and more particularly to paragraph 4 on page 22 thereof.

Applicants through Learned Counsel now seem to have leveled their present application, not only at Amendment No. 7 as amended by Amendment No. 14 to the Federal Constitution, but at practically the entire Bill of Rights, and certainly at least at Amendments Nos. 1 and 6 in addition to Amendment No. 7, in spite of their expressed statement of "Questions Presented" as appears on pages 2 and 3 of their application to this Court.

To attempt to reasonably discuss the entire Bill of Rights or even Amendments Nos. 1 and 6 thereof, in addition to Amendment No. 7, as amended by Amendment No. 14, would increase the size of any brief by mathematical progression, so we will attempt to limit this brief in opposition to the application aforesaid — to applicants' stated "Questions Presented".

We would now like to engage in a short discussion of the more recent cases cited by applicants and point out that even if applicants' cases were pertinent to the issues involved herein which we are inclined to doubt, that then and even then this Court's refusal of writs in the *Tannehill v Roberts* case, p. 5 hereof, which was in late 1969 was, of course, more recent than any of applicants' cited decisions.

In their cited case of *Duncan v Louisiana*, 391 U.S. 145, 20 L.Ed. (2) 491, Rehearing Denied 20 L. Ed. (2)

1412-392 U.S. 947, the case presented involved a criminal statute and a misdemeanor trial for battery where the statute attacked provided for penalties up to two years of imprisonment and this Court held that in a case involving a possible penalty of some two years, the 6th Amendment should be applied requiring a trial by jury.

In *Gitlow v New York*, 268 U.S. 652, 69 L. Ed 1138 cited by counsel, although an older case, having been decided in 1925, a criminal statute of the State of New York was involved aimed at punishing sedition and advocacy of overthrow of government, and the Court held that the Statute was not violative of the 1st and 14th amendments of the Constitution, and did not require an actual physical attempt to overthrow the Government in order to remain within the Constitutional limitations.

In the case of *Bloom v Illinois*, 391 U.S. 194, 20 L.Ed. (2) 522, cited by applicants, the case involved criminal contempt where a possible penalty of twenty four months imprisonment could be imposed, and this Court held that under the circumstances a trial by jury should be held under the terms of the 6th and 14th amendments as such a possible punishment certainly could not be held to be merely petty.

In the case of *Slocum v New York Life Insurance Company*, 228 U.S. 364, 57 L.Ed. 879 appearing on page 6 of applicants' petition, the case involved Federal courts and not State courts and, of course, is self-explanatory.

As to the case of *Jacob v City of New York*, 315 U.S. 752, 86 L.Ed. 1166 cited and quoted from in part by applicants, we think it should suffice for our purposes to point out not only does the case involve the Federal Courts, but also involves the Jones Act which should, in our opinion, be amply sufficient to entirely differentiate same from the case before the Court.

It would therefore seem to us that Counsel in citing the authorities above set forth was going somewhat afield from those cases involving trial by civil jury in State courts under the 7th and 14th Amendments to the Constitution.

We do not understand the reason Learned Counsel sets forth on page 16 of his brief what appears to be the paucity of civil jury trials in Louisiana prior to the year 1963 when any mere casual examination would demonstrate the innumerable civil jury trials in Louisiana State Courts that are presently pending and have been tried in the last several years.

Before closing we cannot but express our wonder why applicants in their application for writs, who now attempt to raise questions involving practically the entire Bill of Rights, have chosen to ignore or practically ignore the fact of their untimely raising of any constitutional questions whatsoever until their petition for a rehearing was presented to the Court of Appeal below (see applicants' petition pp. 4 and 5) and at such time as it was too late to raise such questions (see pp. 7-8 hereof), which, of course, was pointed out in both the Appellate Court for the Fourth Circuit of Louisiana and in the Supreme Court of Louisiana.

CONCLUSION

It would, therefore, seem to us that not only has the attempted injection of Federal constitutional questions been brought too late, but that the 7th and 14th Amendments to the United States Constitution have no restrictions which should possibly apply to the judgment of the Court of Appeal for the Fourth Circuit, State of Louisiana, and that applicants' application for writs should be refused.

Respectfully submitted

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CERTIFICATE

I hereby certify that copies of this brief have this day the ____ day of _____, 1971, been served upon C. Ellis Henican, Jr. and Henican, James and Cleveland, Attorneys for Plaintiffs-Applicants, by placing same in the United States mail, addressed to their offices 225 Baronne Building, New Orleans, La. 70112.

_____